

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 334 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

CHAVDA DHUDAJI BHIKHAJI

Versus

HEIRS OF KUMBHAR CHELA BECHAR

Appearance:

MR DN PANDYA for Appellant - Petitioner

MR SK JHAVERI for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 25/03/98

ORAL JUDGEMENT

1. This is defendant's Second Appeal.

2. The facts giving rise to this Appeal are that the plaintiffs - respondents filed Suit for possession of plot No.105/1, area 1 Acre - 30 Gunthas situated in the sim of village Joeta and also claimed Rs.2000/- as mesne profit for the last three years before institution of the Suit. The said village was said to be a Jagiri village and the plaintiff - respondent since the time of his ancestors was in occupation of the aforesaid plot. Jagiri was abolished under the Bombay Merged Territories and Areas (Jagirs) Abolition Act, 1953. The plaintiff

respondent was paying "Vaje" and was considered to be occupant of the Suit land. It was under his cultivation, he was irrigating the same from the well situated in his another plot No.106/4. The defendant - appellant was Bhayat of the local Jagirdar. Being influential person and a strong man he forcibly trespassed over the plaintiff's land about four years before institution of the Suit with the help of revenue officer and obtained entry No.140 dated 1.7.1970 in his name. This entry was subsequently set aside by the Appellate Authority Deputy Collector. Thus, the plaintiff - respondent claiming to be occupant and in the alternative claiming to be in possession since long, filed Suit for recovery of possession of the disputed land and also for mesne profit.

3. The Suit was contested by the defendant denying the allegations made by the plaintiff - respondent. He pleaded that the disputed land was his Jagiri land and he being Bhayat of local Jagirdar since time of his ancestors, was in possession of the same and was cultivating the same. His name matured in revenue record and the revenue entries in his favour are completely legal and valid. The entry of the plaintiff in revenue record, according to the defendant - appellant, is in-effective and does not confer any title on him.

4. The trial Court decreed the Suit for recovery of possession and granted Decree for Rs.600/- for three years mesne profit at the rate of Rs.200/- per annum.

5. The Appeal was preferred which was dismissed. Hence this Second Appeal.

6. Following substantial question of law was formulated in this Appeal for adjudication :

Whether the plaintiff's title can be said to be proved in view of the plaintiff's admission in cross examination that he had no material to show his title and possession during Danta State Regime ?

7. The learned Counsel for the appellant was heard and the Judgment of the two Courts below were examined with the help of the record. At the out set it may be mentioned that the so called substantial question of law formulated for adjudication is no substantial question of law. The trial Court held that the plaintiff's title as owner or occupant was not proved from the evidence on record. This finding was reversed by the Appellate

Court. However, the two Courts below were concurrent in their view that the plaintiff was in possession over half of the plot in question since long. The finding of the trial Court on title was reversed by the lower Appellate Court for cogent reasons after considering the extract of revenue records and oral evidence adduced by the parties so also the admission made by the defendant's witness. It is incorrect to say that whenever there is reversal of a finding on question of fact by the Appellate Court it must always be disturbed in Second Appeal. It was not only on the ground that the plaintiff made some admission in cross examination that he had no material to show his title and possession during Danta State Regime that the title of the plaintiff was not up-held by the trial Court or that this was ignored by the lower Appellate Court. What emerges from the Judgment of the two Courts below is that plaintiff - respondent stated that he was paying "Vaje" of Danta State for the Suit field and was also paying revenue tax to the Government. No doubt the receipts for payment of "Vaje" or revenue tax were not filed by the plaintiff - respondent, but that alone is not sufficient to dis-credit the case of the plaintiff respondent. There is nothing on record to show that the plaintiff is in possession of these old documents. Non filing of these documents could not be a ground for throwing away the case of the respondent.

8. The lower Appellate Court has relied upon documentary evidence, viz. extract of revenue record which has been discussed at length in the judgment of the lower Appellate Court. It was, however, contended by the learned Counsel for the appellant that entries in the revenue extract cannot establish title of the respondent. Few cases were cited in support of the contention. Two of such cases are mentioned in the Judgment of the lower Appellate Court.

9. In Sita Ram Bhau Patel V/s. Ramchandra Nago Patel reported in A.I.R. 1977 SC 1712, while interpreting Section 135-J of Bombay Land Revenue Code the Apex Court held that there is no absolute principle that whatever will appear in the record of rights will be presumed to be correct when it is shown by evidence that the entries are not correct. This case, to my mind, does not help the appellant, because the Apex Court has laid down that entries in the record of right will not be presumed to be correct if it is shown by evidence that the entries are not correct. In the case before me there is evidence that entry at Sr.No.140 dtd.1.6.1976 was made in favour of the defendant. The plaintiff - respondent,

however, challenged this entry and the learned Deputy Collector in Appeal No.1/76 ordered the said entry to be set aside. In view of this, the entry in the name of the defendant - appellant was ordered to be set aside and it was struck off. It was held by the Appellate Authority that the name of the defendant was wrongly entered in the record of rights. Thus, when the revenue Authority had an occasion to test and examine the correctness of the entry in the record of right and ordered that the name of the defendant - appellant to be expunged from the record of right there is presumption that the entries so corrected are true, genuine and correct. There is thus not only presumption in favour of correctness of revenue entries, but also proof in the nature of the order of the Appellate Authority that these entries in favour of the plaintiff - respondent are correct. The order of the Deputy Collector was passed on 11.3.1973 vide Ex.26.

10. There is also oral evidence to support the case of the respondent that he had been in occupation of the land in Suit for several years before institution of the Suit.

11. One of the appellant's witness Jakharsing Udaysing admitted that no survey took place during the Jagir period and survey was carried out only 10 to 15 years ago. He further admitted that the portion of the disputed land which is now cultivated by the defendant was cultivated by the plaintiff. He, likewise, admitted that the plaintiff was cultivating the suit land for the last 10 years. In view of these admissions of the defendant's witness the case of the plaintiff respondent receive support and corroboration and negatives the case of the appellant that he had been in possession for last 10 years.

12. Thus, upon over all consideration of oral and documentary evidence the Lower Appellate Court rightly held that the title of the plaintiff - respondent as occupant of the land was fully established.

13. Alternative case pleaded by the respondent regarding possessory title was also proved and there is concurrent finding of the two courts below that the plaintiff - appellant was in continuous possession of the Suit land till before the alleged tres-pass which took place about four years before institution of the Suit. This finding is based upon proper appreciation of evidence on record and it hardly requires any interference in this Second Appeal.

14. It may be mentioned that a person successfully establishing his title as well as title by possession, viz. possessory, title is entitled to a Decree for possession against the defendant - appellant who was tres-passer. The decree for possession, in these circumstances, requires no interference.

15. If the Decree for possession is to be maintained then the Decree for mesne profit also cannot be disturbed. A very reasonable amount was determined as mesne profit, viz. at the rate of Rs.200/- p.a. as against the claim of Rs.2000/- p.a. This amount also requires no interference.

16. The learned Counsel for the appellant, however, raised two other contentions. The first was that the Suit is time barred hence Decree for possession and mesne profit could not be passed. The second contention has been that the property in Suit is not properly described or specified. Hence, the Decree is incapable of execution.

17. So far as question of limitation is concerned it was not raised in the trial Court and no issue was framed. The Appellate Court considered oral arguments on plea of limitation and repelled the same holding that the Suit is within limitation. The contention of the learned Counsel for the appellant has been that the Suit should have been filed within three years of alleged tres-pass. This contention cannot be accepted. Since the plaintiff has established his possessory title and also his title as occupant of the land in dispute Articles 64 and 65 of Schedule of Limitation, Part : 5th will apply.

Article 64 provides that in a Suit for possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed the limitation will be 12 years from the date of dispossession.

Similarly under Article 65 in a Suit for possession of immovable property or any interest therein based on title the period of limitation will be 12 years when the possession of the defendant became adverse to the plaintiff.

18. Thus, in either view of the matter under Article 64 or under Article 65 of the Limitation Act the limitation will be 12 years from the date of dispossession. The Suit was filed in the year 1973 (7.2.1973). The two Courts below have mentioned in their

Judgments that the plaintiff - respondent alleged dispossession 4 years before institution of the Suit. Even recorded entry in favour of the defendant appellant since 1966 to 1967 was set aside by the Deputy Collector on 11.3.1973, Ex.26. As such the Suit cannot be said to be time barred.

19. So far as vagueness in Decree is concerned, I find that initially the suit was filed claiming possession over entire area of 1 Acre - 30 Gunthas of the disputed plot, but in the witness box the plaintiff - respondent confined his claim only to half of this portion and the Decree of the trial Court is only for half of the portion. Both the Courts below found that there was no mis-description of the property. The appellate Court specifically mentioned that the defendant - appellant admitted that half of the western portion of Survey No.105/1 was in his possession and the eastern half was in possession of the plaintiff's brother Dalchha Bechar. Thus the defendant - appellant himself admitted clear and distinct demarcation of the portion possessed by him. He, further, admitted that portion of land in his possession was at a lower level and the land in possession of plaintiff's property was at a height of 2-1/2 ft. Thus, the property in suit can be specified from this admitted discreption of the property given by the defendant appellant and there will be no difficulty at the time of execution of the Decree. The Decree can be executed in respect of half western portion of Survey No.105/1 lying low to a depth of 2-1/2 ft. from the land in possession of the plaintiff's respondent. Thus, on this ground also no interference is required in the Judgment and Decree of the two Courts below.

20. No other point was pressed.

21. In the result, I do not find any merit in this Appeal which is hereby dismissed. No order as to costs.

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